WT 15-180

EX PARTE OR LATE FILED

THLOPTHLOCCO TRIBAL TOWN

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December 5, 2016

Federal Communications Commission
Attn: Tom Wheeler, Chairman
445 12th Street SW
Washington, DC 20554

RE: The Petition for Declaratory Ruling Filed By Pta-Fla, Inc. On May 3, 2016

Dear Chairman Wheeler:

We have reviewed the "Petition for Declaratory Ruling" filed by PTA-FLA, Inc. and filed on May 3, 2016. We have just become aware of the petition the week of November 28, 2016.

However, the issues discussed in the Petition was first brought to the Tribes on September 1-2, 2016 and was presented as an issue that just come up, and that we needed to discuss possible resolutions. Currently we have been informed we have 45 days from November 21, 2016 to come up with a resolution, or the FCC will prioritize the Petition immediate action that could be contrary to government to government relations between the FCC and Tribal Nations. It is in our belief that the actions taken by the FCC are not conducive to government to government relations with Tribal Nations. It appears that the discussions and work that has been accomplished between September 1 and this date have been superficial in regard to this matter.

It is our belief that had the FCC consulted with Federally-recognized tribes as mandated by Section 106 of the NHPA, and as other Federal agencies do, this would not be an issue. We ask the FCC to take responsibility for answering the question of 'why' the agency does not consult on a government-to-government basis as required by Executive Order, and also why the FCC has not taken a proactive stance to consult with Tribes in regards to this Petition.

It is obvious the Petitioner chooses not to understand nor abide by Section 106 of the NHPA, nor does the Petitioner recognize the government-to-government relationship between federally recognized tribes who are sovereign governments.

The Petitioner states that the mandate of the National Historic Preservation Act 'can be much more efficiently and expeditiously preserved by a more targeted application of the law.' Indeed, as the Petitioner implies and requests through the Petition for interpretation of NHPA and potential exceptions and even changes to this law, it is our belief that these matters are better addressed to the Advisory Council on Historic Preservation (ACHP), and to address changing the federal law. It is our belief that Section 106 of the NHPA is to simply be followed, and request

that the FCC assume their responsibility on consulting with the tribes on a government to government basis regarding projects requiring their permits, and until that can be corrected; the TCNS system has been working for us. In addition, until such time that the FCC takes that responsibility, if we are required to do work for a privately owned company which we do not consider as a government to government consultation, we will continue to charge these companies for our services to complete their reports. As stated at the beginning of this letter, the 'tower constructors' do not have an obligation with respect to Indian tribes under Section 106. That responsibility is with the federal agency.

We believe this Petition to be frivolous. The 'matter' has no legal standing, as there is no obligation that exists as captioned. Statements made in the Petition are inaccurate, full of assumption and hearsay, and only represent one company. We do not believe over 500 federally recognized tribes should be spending our time and resources answering to one company on how we conduct our government nor our business activities. Lastly, we ask the FCC to explain to these 'tower constructors' that Section 106 of the NHPA must be followed until the law is changed.

We wish for this letter to be entered into the official record, and respectfully request a response to our concerns as well as a statement on what type of response the FCC has prepared to these frivolous and inaccurate assumptions.

Sincerely,

Ryan Morrow
Town King

Enclosure

CC: Lyle Ishida, Acting Chief of the Office of Native American Programs
Jeffrey Steinbery, Wireless Bureau
NATHPO
Lisa Baker
Emman Spain, THPO Director
File

Attachment A

•In the captioning of the Petition, it reads "In the Matter of Clarifying the Obligations of Tower Constructors with Respect to Indian Tribes under Section 106." This statement should label this Petition as a 'frivolous' petition, as there IS no obligation of Tower Constructors under Section 106. The obligation, under Section 106, is with the Federal agency – in this case, the FCC.

•The Petition refers to coordinating historic preservation uses with tribal representative being streamlined, although the coordination, though delegated to a tribal representative, is with tribal governments.

• The Petition states that the clarifications are "matters of FCC's interpretation of the NPA's scope and how it is implemented", when, in fact, the clarifications should be with Section 106 of the National Historic Preservation Act, and should be addressed to the Advisory Council on Historic Preservation (ACHP) and their interpretation.

•The Petition makes claims of "repeated notifications to tribes, sometimes without receiving any response, interjects in itself several months of delay into the construction process even when no impairment to an Indian site in implicated." The FCC's process, utilizing TCNS, is to ask the FCC to notify the tribe for a response if no response is received after 30 days, the time allowed by Section 106 of the NHPA. If no response is received after notification by the FCC, the tribes are considered to not be interested and construction may proceed (as long as all other requirements have been met). Therefore, repeated notifications without response are addressed in the FCC protocols, and should not be a concern.

•The Petition states in many different sections and using varying verbiage, that 'the availability of these fees and payments to tribal members to 'monitor' construction has probably encouraged the expansion of areas of interest since the more sites a tribe reviews, the more revenue it generates. Given the miniscule number of sites that are actually found to affect Indian burial grounds as a percentage of sites reviewed, the process seems to not only be addressing a problem which does not exist, but is actually creating a 'new' problem by delaying the construction of the tower infrastructure needed to deliver broadband to unserved or underserved areas." In another section, the Petition states, "This might be acceptable if the process served some discernible public interest purpose, but the fact is that in the vast majority of cases, there is no adverse impact on a tribal site at all." Yet another section states "In no case do the FCC's rules provide that prospective opponents of a particular action must be paid to determine whether they wish to lodge a protest – except one: tribal notifications. Unlike citizen groups, parents concerned about children's programming, historical associations worried about a proposed construction, neighbor's concerned about RF radiation, radio states which might be affected by a new station in the vicinity, or a host of other people or institutions who might possibly be affected by something the FCC is considering, only Indian tribes now routinely require and receive payment to review and consider a tower construction proposal." Throughout the Petition, the writer calls tribal governments 'cash-strapped' and insinuates that tribes are taking advantage of a situation. All of these statements are moot. It does not matter whether the review ends up revealing a tribal concern. In addition, Tribal governments are not the same as the groups mentioned, and are not a special interest group, but sovereign nations who have a government-to-government

relationship with the United States, and consultation with these tribes is a mandate of Section 106 of the NHPA. This does not make us a 'prospective opponent,' but a partner.

As stated by the Department of the Interior, who oversees the Tribal Historic Preservation Office program, "The Section 106 regulations (*36 CFR 800*) place particular emphasis on consultation with THPOs, tribes, and NHOs. Federal agencies must consult THPOs, tribes, and NHOs about undertakings when they may affect historic properties to which a tribe or NHO attaches religious or cultural significance. This requirement applies regardless of the location of such historic properties.

If an historic property is not listed in or has not previously been determined eligible for the National Register then, as part of the Section 106 process, it should be evaluated by the Federal agency in consultation with the appropriate SHPO, THPO, tribes, or NHOs to determine if it meets National Register eligibility. Steps for determining eligibility can be found in *National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation.*

If there are questions or disagreements about the National Register eligibility of an historic property, the Federal agency overseeing the undertaking can seek a formal Determination of Eligibility (DOE) from the Keeper of the National Register (see *36 CFR 63*). The Keeper will then determine if the property is eligible for listing in the NRHP.

The ACHP's regulations *36 CFR 800 (Protection of Historic Properties)* govern the Section 106 process and outline how Federal agencies are to consult with SHPOs, THPOS, tribes, NHOs, other interested parties, and the public as the Federal agencies identify historic properties, determine whether and how such properties may be affected, and resolve adverse effects."

Conditionally, the FCC rules DO NOT mandate, regulate, or require payment to Tribal governments for our work; rather, it is the governing bodies of tribal governments who determine the requirements for the work, including the fee for providing such work for consultants hired to do the research on the applicant's tower. It is our position that our services are provided to the consultant gathering the information for the applicant, and for this work, we charge a fee. The FCC does not consult with tribes as required under Section 106, and delegates the consultation to the applicants, who delegate it to an outside consultant who asks for our review. We do not see this work for a privately-owned company to be part of a government-to-government consultation, but rather, a service to a company. Just as the consultant charges the applicant for their work, we charge for our work to the consultant. It is only the responsibility of the tribal government to set fees for their work.

•On page 3 of the Petition, it states, "In real life, the process runs something like this:" and the goes on to document a supposed scenario that is unlike our experiences. The 'way it works' is nothing like this example, and is in fact, not even tribal-specific. It is actually consultant or applicant specific. We work with over 100 consultants and applicants on tower reviews, and each can be different. The 'real life' scenario should be considered 'hear-say.' One example of a step in their 'real-life' process is stated that in Week 5, materials are sent to tribes, and then in Week 6-8, tribes who have not responded are referred to the FCC. How can this be 'real life' when we have 30 days from receipt of materials to send a response?

• The petition is replete with derogatory remarks such as: "Cash-strapped tribes,' 'if a tribe hunted in Tennessee in the 17th century or walked through Kentucky on its way west,' etc., are all stated in a way that seem like the Petitioner is holding a grudge and has no place in a legal Petition. In addition, throughout the Petition, it refers to tribal burial grounds as being the issue. 'Burial grounds' is a stereotype and buzz word. Section 106 calls for review and identification of sites that are eligible for or listed on the National Register of Historic Places, in addition to burials. These can be sites of ANY type of historical significance.

• The most shocking statement in the Petition appears on Page 16. It states that an 'insurance policy' to 'fix' or stop work on a 'verifiable' Indian burial ground, would be a positive move because "This would ensure at a relatively small cost that tower constructors would not violate the integrity of previously unknown Indian sites. The crews working on such a site and the people they work for would then be incentivized to report any burial ground they came across **as opposed to the current incentive to not report it since the result would be that they would all get paid the same but not have to complete the work**." This seems like an admission that their crews are not reporting human remains which is part of NAGPRA, and state burial and cemetery laws. This statement certainly requires addressing by not only the FCC, but the ACHP, National NAGPRA, and state and local law officials on projects completed by this company, and perhaps all 'tower constructors.' We are deeply concerned by this admission.

Although there are numerous statements in this Petition we take exception to, I will jump to the "Steps the Commission Should Take":

1. Grant the instant request for a declaratory ruling that site construction by non-licensees and/or licenses under non-site specific licenses where neither FCC registration nor a Section 1.1308 environmental assessment by the Commission is required do not constitute a federal undertaking and therefore are not subject to the Section 106 process. As set forth above, this was the premise of the Court's approval of the FCC's regulatory approach, and limitation to that premise would not only follow the mandate of the NHPA by conform to the Court's ruling. This relief in itself would eliminate 90% of the problems.

   Our response: We are not aware of ANY projects which are sent to us by the FCC through the TCNS system that do not require a federal (FCC) permit, nor do we ever receive a project which is non-site specific. Each TCNS project is sent to us as an initiation of Section 106 review because it is being federally permitted, and each site has a specific address or GPS location listed in the TCNS filing.

2. Adopt the measures proposed by the Commission in Docket 15-180 to exempt various construction categories from the Section 106 process should be adopted. In particular, any construction which does not create any material new subsurface disturbance should not have to undergo the tribal review process.

Our response: We would not be opposed to discussing Categorical Exclusions from the Section 106, and would be open to consulting with the FCC to agree on those exclusions, should the FCC ask us to consult on such a matter.

3. To deal with the issues associated with tribal review, we urge the Commission to adopt the following:

   a. Prohibit the payment of fees for tribal reviews altogether. In no other circumstance does the Commission require the payment of fees as a gating toll to interest groups who might be affected by a Commission action, and there is no reason to do so here. The fee payment practice has demonstrably contributed to the expansion of required reviews and the attendant delays. In Narragansett Indian Tribe v Warwick Sewer Authority, 334 F.3d 161 (1st Cir., 2003), the Court flatly rejected a tribe's demand to be paid to monitor construction activities, the tribe was entitled to be consulted and nothing more.

   Our response: The FCC cannot 'prohibit' something is does not require, mandate or regulate. Only our tribal government and our legislative bodies can determine whether we will do work for a private company and for what fee, and what terms for payment. The 'fee practice' has not contributed to the expanded reviews in the case of our tribe, and if Narragansett was denied monitor fees for a specific project, that is not the norm for Section 106 projects. Many, many projects are discussed in government to government consultation with numerous federal agencies that result in monitoring reimbursement or remuneration. However, monitoring is a completely separate issue from review fees.

   b. *Alternatively*, reviewing fees should be limited to no more than 50.00 unless the tribes demonstrate that the review is exceptionally complex. In no event should the fee exceed 200.00.

   Our response: Again, only each individual tribal government's governing body can determine the amount of fee. And, most tribes will have different fees based on different circumstances and different methods, etc. Throughout the Petition, the writer infers that the tribes are only trying to 'make money' while the 'tower constructors' are trying to 'save' money. The petitioner states what a burden all of the various costs involved in tower construction are, too. I am hopeful that the petitioner realizes that expenses to the tribe for reviews are many, as well, and that the tribe's governing body is quite capable of knowing what that expense is. While the Petitioner states that the cost of reviews sometimes meets or exceeds the cost of the tower's construction, it would appear that they are not including the review fees in the cost of the tower.

c. Tribes should be required to identify under objective, independently verifiable criteria the areas where construction could reasonable be deemed to have an impact on tribal grounds. The mere fact that tribes progressed through an area or hunted in an area two hundred or a hundred years ago should not be a basis, without more, for declaring the entire are subject to the Section 106 process. By limiting and clearly defining areas where tribes actually resided or habituated, tower constructors can have a better idea of what sites to avoid before tower planning even begins. Areas of tribal concern should be known or knowable facts for tribes and the public alike.

The backwardness of the current process could be likened to a SHPO indicating that there is a historic site somewhere in the District of Columbia that needs to be protected, but the SHPO will only tell you (for a fee) where the historic site is not located. The infinitely more efficient and rational approach is to do exactly what the historic community now actually does: publicly identify where historic properties are, thus permitting constructors to either avoid them altogether or know what they have to deal with at the outset. A similar approach should be taken to protect tribal sites. By having everyone work from the same maps, potential impacts on tribal areas of concern could be significantly reduced, also reducing the need for totally unnecessary reviews.

Our response: Each sovereign tribal government has the right to protect information regarding our sacred sites, Traditional Cultural Properties, burials, etc. from vandalism, looting, and exploitation. Numerous federal agencies respect this and even encourage it. Numerous sites on the National Historic Register, and not just tribal sites, are listed with 'address undisclosed' caveats. Lastly, due to the nature of our sites which includes length of occupation, historic timeframe, and unknown sites due to forced removals and other circumstances out of our control as well as lack of written documentation versus our oral tradition, it is impossible to identify a site and its significance in relation to eligibility for the National Register, without government to government consultation between the federal agency and the tribal government. That is what the NHPA mandates.

As the Department of the Interior states, "Section 106 is the portion of the National Historic Preservation Act (NHPA) that is concerned with the review of Federal undertakings for their effects on historic properties.

A Federal undertaking is a project, activity, or program either carried out by or on behalf of a Federal agency, or is a project, activity, or program funded, permitted, licensed, or approved by a Federal

agency. Undertakings may take place either on or off federally controlled property and include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

Section 106 requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) with a reasonable opportunity to comment. In addition, Federal agencies are required to consult on the effects of their undertakings on historic properties with State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), Indian tribes (including Alaska Natives), and Native Hawaiian Organizations (NHO).

Historic properties are any prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for listing or already listed in the National Register of Historic Places. Also included are any artifacts, records, and remains (surface or subsurface) that are related to and located within historic properties and any properties of traditional religious or cultural importance to tribes or NHOs.

The Section 106 regulations (*36 CFR 800*) place particular emphasis on consultation with THPOs, tribes, and NHOs. Federal agencies must consult THPOs, tribes, and NHOs about undertakings when they may affect historic properties to which a tribe or NHO attaches religious or cultural significance. This requirement applies regardless of the location of such historic properties.

If an historic property is not listed in or has not previously been determined eligible for the National Register then, as part of the Section 106 process, it should be evaluated by the Federal agency in consultation with the appropriate SHPO, THPO, tribes, or NHOs to determine if it meets National Register eligibility. Steps for determining eligibility can be found in *National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation.*"

d. PTA's experience, one which is shared by many of the commenters in Docket 15-180, is that tribal tower site reviews almost never result in a finding of adverse impact on a tribal site. This in itself suggests that a massive amount of effort and money is being directed at a problem which does not truly exist. Perhaps a better approach both from the perspective of tribes and the construction industry would be to have an insurance program paid into by all tower constructors. In those rare circumstances where a verifiable burial ground is discovered at a tower site project, the insurance would cover the cost of immediate stoppage of work on the site and restoration of the property to its original state. This would ensure at a

relatively small cost that tower constructors would not violate the integrity of previously unknown Indian sites. The crews working on such a site and the people they work for would then be incentivized to report any burial ground they came across as opposed to the current incentive to not report is since the result would be that they would all get paid the same but not have to complete the work.

Our response: PTA cannot know, or represent, tribal perspective. PTA's experience (and the fact that they are the only private company filing this petition) should not be enough to encourage a federal agency to disregard the federal law – National Historic Preservation Act. Section 106 of that act requires consultation – period. To say that these efforts are directed at a problem which truly does not exist is wrong – the problem that existed before NHPA is that tribal governments were not consulted with, and that has been alleviated by the passage of this act. The statement that this 'insurance' would prevent constructors from violating the integrity of previously unknown burial sites is contradictory to the previous sentence which states that the insurance would help mitigate and 'restore' a property to its original state. In addition, there is no possible way to restore to its original state, a desecrated burial. Again, the Petitioner seems to think burial grounds are the only properties eligible or listed on the National Historic Register, and this is addressed elsewhere in this letter. Lastly, the admission of non-reporting is also addressed elsewhere in this letter.

e. The NPA and Collocation Agreements should be amended to exempt from review sites which will obviously have no effect on tribal burial grounds. These include sites which have been previously disturbed (parking lots, farm lands, previously developed sites, sites built on solid rock, sites that sit on top of the ground and don't disturb the subsurface, and the like). Sites falling in designated utility or highway rights of way should also be excluded. Collocations on existing structures should also be categorically exempt from tribal review. While such sites might require historical review, these would never have an adverse tribal impact.

Our response: The assumption that these would never have an adverse tribal impact is just that – an assumption. It is quite possible, and has happened on other federal undertakings, to identify or inadvertently discover sites (not just burials) associated with many of these suggested exclusions. While we do not agree with each exclusion, we are not opposed to discussing categorical exclusions with the FCC, should they invite us to consult on a government to government basis on this issue.